

**A Victoria a/p Arulsamy v Jye Tai Precision Industrial
(M) Sdn Bhd**

HIGH COURT (IPOH) — JUDICIAL REVIEW NO 25–20–OF 2001
SU GEOK YIAM JC
16 JULY 2002

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Labour Law — Employment — Reinstatement — Fight between employees on employer's premises — Whether fighting amounted to misconduct which warranted dismissal — Whether dismissal was with just cause and excuse — Whether Industrial Court breached the rules of natural justice — Whether Industrial Court erred in applying common law principles — Whether reinstatement of applicant an appropriate remedy

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The applicant was an employee of the respondent ('the employer') since 19 September 1989. On 15 June 1999, there was a quarrel and a fight between the applicant and another employee called Julie ('Julie') in the car park of the employer's premises ('the workplace'). As a result of the fight, both women sustained injuries. They also fainted. The applicant was hospitalized for two days. The employer held a domestic inquiry for the applicant on 28 June 1999 and for Julie on 1 July 1999. The applicant and Julie brought their own witnesses to the domestic inquiry. Based on the findings and recommendations of the three panel members of the inquiry, the applicant was dismissed on 6 July 1999 by the employer. Julie was also dismissed. The applicant applied to the Industrial Court pursuant to s 20(3) of the Industrial Relations Act 1967 ('the Act') seeking reinstatement to her former position without any loss in service and seniority, backwages in respect of basic salary with fixed monthly allowance and commission and all other benefits and privileges and alternatively, for loss of wages together with compensation in lieu of reinstatement. The Industrial Court ('IC') decided in favour of the employer. It held that the dismissal was for just cause or excuse. The applicant applied to the High Court for an order of certiorari to quash the award ('the award') of the IC.

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Held:

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- (1) In the instant proceedings, although the IC was correct in holding that in proceedings by an employee pursuant to s 20 of the Act to challenge his purported dismissal by his employer, the onus was on the employer to show that it was with just cause or excuse, the IC committed an error of law when it asked itself the wrong question. In cases where the employee had been dismissed for misconduct and the misconduct complained of was fighting, it was incumbent on the IC to consider and satisfy itself whether based on the facts fighting per se warranted an automatic dismissal (see p 42A–C).
- (2) On the facts, the act of 'fighting or striking another employee within the company's premises' per se did not warrant instant dismissal since the words used in the employer's rules and

regulations were 'liable to' which meant 'subject to' and it was for the employer to decide what was a reasonable form of disciplinary action to impose on the employee after taking into consideration all the surrounding circumstances and the employee's length of service (see p 43F–G); *Pernas OUE Penang Sdn Bhd v Jusbinder Suraj Singh* [1997] 1 ILR 115 distinguished.

- (3) The IC erred when it did not consider that the applicant was never given the opportunity to cross-examine Julie nor Julie's witnesses during the domestic inquiry. Since this was not done, it amounted to a breach of the rules of natural justice. The IC should have rectified the breach of the rules of natural justice by allowing the applicant to cross-examine Julie and Julie's witnesses during the hearing before the IC. The reason was because on questions affecting the credibility of witnesses, the findings of the IC are final and the High Court could not interfere unless the findings had no basis and the decision was so unreasonable that no reasonable tribunal could have arrived at it (see p 44H–45A).
- (4) The IC had erred when it applied common law principles in arriving at its decision that the dismissal of the applicant was with just cause or excuse instead of the statutory principles contained in s 20 of the Act (see p 46G); *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137 followed.
- (5) The decision of the IC was perverse in the light of the evidence before it and ought to be quashed. However, in view of the large number of workers employed by the employer, to wit, 420, and the serious injuries which were suffered by both the applicant and Julie, which caused both of them to faint and the applicant to be hospitalized for two days, the court felt that the reinstatement of the applicant was not appropriate despite her long service of 11 years. In the premises, the court ordered that the matter be remitted back to the IC to consider the amount of compensation in lieu of reinstatement to be paid to the applicant (see p 47E–G).

[Bahasa Malaysia summary]

Pemohon merupakan seorang pekerja pihak penentang ('majikan') sejak 19 September 1989. Pada 15 Jun 1999, satu pertengkaran dan pergaduhan telah berlaku di antara pemohon dan seorang lagi pekerja bernama Julie ('Julie') di tempat letak kereta premis majikan ('tempat pekerjaan'). Akibat pergaduhan tersebut, kedua-dua wanita mengalami kecederaan. Mereka juga telah pengsan. Pemohon dimasukkan ke hospital selama dua hari. Majikan telah mengadakan satu siasatan dalaman untuk pemohon pada 28 Jun 1999 dan untuk Julie pada 1 Julai 1999. Pemohon dan Julie telah membawa saksi mereka sendiri ke siasatan dalaman. Berdasarkan penemuan dan

- A pengesyoran yang diberi oleh tiga ahli panel siasatan, pemohon telah dipecat pada 6 Julai 1999 oleh majikan. Julie juga telah dipecat. Pemohon membuat permohonan kepada Mahkamah Perusahaan ('MP') menurut s 20(3) Akta Perhubungan Perindustrian 1967 ('Akta tersebut') meminta pengembalian jawatan kepada jawatan lama beliau tanpa sebarang kehilangan dalam perkhidmatan dan pengalaman, gaji tunggakan berkaitan dengan gaji bersih bersama elaun bulanan tetap dan komisyen serta segala manfaat dan keistimewaan yang lain dan secara alternatif, untuk kehilangan gaji bersama pampasan sebagai ganti pengembalian jawatan. MP telah memutuskan untuk memihak kepada majikan. Ia memutuskan bahawa pemecatan tersebut adalah dengan alasan atau sebab munasabah. Pemohon telah memohon kepada Mahkamah Tinggi untuk satu perintah certiorari bagi membatalkan award ('award tersebut') oleh MP tersebut.

Diputuskan:

- D (1) Dalam prosiding ini, walaupun MP adalah betul dalam memutuskan bahawa dalam prosiding yang dimulakan oleh seorang pekerja menurut s 20 Akta tersebut untuk mencabar pemecatan yang dimaksudkan oleh majikan, beban terletak pada pihak majikan untuk menunjukkan ia adalah dengan alasan atau sebab munasabah, MP terkhilaf dari segi undang-undang apabila ia mengemukakan soalan yang salah. Dalam kes di mana pekerja telah diberhentikan kerana salah laku dan salah laku yang diadukan adalah pergaduhan, ia menjadi kewajipan MP untuk menimbang dan memuaskan diri sama ada berlandaskan fakta-fakta pergaduhan dengan sendirinya mewajarkan satu pemecatan automatik (lihat ms 42A-C).
- E (2) Berdasarkan fakta-fakta, tindakan 'fighting or striking another employee within the company's premises' dengan sendirinya tidak mewajarkan pemecatan serta merta oleh kerana perkataan-perkataan yang digunakan dalam rukun dan peraturan majikan adalah 'liable to' yang bermaksud 'subject to' dan ia adalah untuk pihak majikan memutuskan apakah jenis hukuman tindakan tatatertib yang munasabah yang harus dikenakan ke atas pekerja setelah mengambilkira kesemua keadaan di sekelilingnya dan tempoh perkhidmatan pekerja (lihat ms 43F-G); *Pernas OUE Penang Sdn Bhd v Jusbinder Suraj Singh* [1997] 1 ILR 115 dibeza.
- F (3) MP terkhilaf apabila ia tidak mengambilkira bahawa pemohon tidak pernah diberi sebarang peluang untuk memeriksa balas Julie mahupun saksi-saksi untuk pihak Julie semasa siasatan dalaman. Oleh kerana ini tidak dilakukan, ia membentuk satu pelanggaran rukun keadilan asasi. MP sepatutnya membetulkan pelanggaran keadilan asasi dengan membenarkan pemohon memeriksa balas Julie dan saksi-saksi Julie semasa pembicaraan di hadapan MP.
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Ini adalah kerana mengenai persoalan-persoalan yang boleh menjejaskan kebolehpercayaan saksi, keputusan MP adalah muktamad dan Mahkamah Tinggi tidak boleh campur tangan melainkan penemuan tersebut tidak berasas dan keputusan tersebut begitu tidak munasabah hinggalah tiada tribunal yang munasabah mungkin akan mencapainya (lihat ms 44H–45A).

(4) MP terkhilaf apabila ia memakai prinsip common law dalam mencapai keputusan bahawa pemecatan pemohon adalah dengan alasan atau sebab munasabah dan bukan prinsip-prinsip berkanun yang termaktub dalam s 20 Akta tersebut; *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137 diikuti (lihat ms 46G).

(5) Keputusan MP adalah terpesong berdasarkan keterangan di hadapannya dan sepatutnya dibatalkan. Namun demikian, memandangkan bilangan besar pekerja yang digaji oleh majikan, iaitu 420 orang, dan kecederaan serius yang dialami oleh kedua-dua pemohon dan Julie, yang menyebabkan kedua-duanya pengsan dan pemohon dimasukkan ke hospital selama dua hari, mahkamah berpendapat bahawa pengembalian jawatan pemohon tidak wajar meskipun telah lama berkhidmat selama 11 tahun. Dalam premis begitu, mahkamah memerintah bahawa perkara tersebut dihantar balik ke MP untuk menimbangkan amaun pampasan sebagai ganti pengembalian jawatan untuk dibayar kepada pemohon (lihat ms 47E–G).]

Notes

For cases on reinstatement, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 938–944.

Cases referred to

Ang Beng Teik v Pan Global Textile Bhd, Penang [1996] 3 MLJ 137 (folld)

Asiatic Development Bhd v Kanesan a/l Manayah & Anor [1998] MLJU 198 (refd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374 (refd)

Din (Taj) v Wandsworth LBC [1983] 1 AC 657 (refd)

Edwards v Bairstow [1956] AC 14 (refd)

Mui Beach Hotel v National Union of Hotel, Bar & Restaurant Workers [1982] 2 ILR 2 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & another appeal [1996] 1 MLJ 481 (refd)

Pernas OUE Penang Sdn Bhd v Jusbinder Suraj Singh (1997) 1 ILR 115 (distd)

R v Hillingdon LBC; ex p Islam (Tafazzul) [1983] 1 AC 688 (refd)

R v Hillingdon LBC; ex p Puhlhofer [1986] AC 484 (refd)

- A** *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (refd)
Steel Farm Industries Malaysia Sdn Bhd v Foo Fook Ban (1991) 1 ILR 412 (refd)
Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba [1998] 2 MLJ 372 (refd)
- B** *Wong Yuen Hock v Syarikat Hong Leong Sdn Bhd and another appeal* [1995] 2 MLJ 753 (refd)

Legislation referred to

- C** Industrial Relations Act 1967 s 20(3)
 Rules of the High Court 1980 O 53

A Kuthiah (Lim Ching Ching with him) (Ku & Partners) for the appellant.
Nantham (Yee Seu Kai with him) (Yee Nantham Leong & Partners) for the respondent.

- D** **Su Geok Yiam JC:** This is an application (encl 1) for an order of certiorari to quash the award of the Industrial Court No 484/2001 dated 2 July 2001, dismissing the applicant's application for damages for wrongful dismissal, interest, alternatively, monetary compensation, costs and any other relief this court deems fit.

- E** FACTS AND BACKGROUND

- The applicant was an employee of the respondent ('the employer') since 19 September 1989. On 15 June 1999, there was a quarrel and a fight between the applicant and another employee called Julie ('Julie') in the car park of the employer's premises ('the workplace'). As a result of the fight, both women sustained injuries. They also fainted. The applicant was hospitalized for two days from 15 to 17 June 1999.

- The employer held a domestic inquiry for the applicant on 28 June 1999 and for Julie on 1 July 1999. The applicant and Julie brought their own witnesses to the domestic inquiry. Based on the findings and recommendations of the three panel members of the inquiry the applicant was dismissed on 6 July 1999 by the employer. Julie was also dismissed.

- The applicant applied to the Industrial Court pursuant to s 20(3) of the Industrial Relations Act 1967 ('the Act') seeking reinstatement to her former position without any loss in service and seniority, backwages in respect of basic salary with fixed monthly allowance and commission and all other benefits and privileges and alternatively, for loss of wages together with compensation in lieu of reinstatement.

- On 2 July 2001, the Industrial Court ('IC') decided in favour of the employer. It held that the dismissal was for just cause or excuse.

- I** On 9 August 2001 the applicant applied to this court vide encl 1 for an order of certiorari to quash the award ('the award') of the IC. On the same date the applicant also applied to this court for leave vide a summons in

chambers (encl 3) pursuant to O 53 of the Rules of the High Court 1980 ('the RHC') to issue an order of certiorari to quash the award.

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On 10 October 2001, leave was granted by this court and on 3 May 2002, this court allowed the applicant's application with costs. This court also ordered that the applicant be paid compensation and that the matter be remitted back to the IC for the assessment of the amount of compensation to be paid by the employer to the applicant. The employer has appealed against the orders of this court. Before I give the reasons why the orders were made, I shall state briefly the case for the applicant and the employer in this application.

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THE APPLICANT'S CASE

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It is the applicant's contention that the award of the IC ought to be set aside on the following grounds.

The IC applied the wrong principle of law

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Mr Kuthiah, the learned counsel for the applicant, has submitted that the IC erred when it applied common law principles in arriving at its decision that the dismissal of the applicant was with just cause or excuse as opposed to the statutory principles which are embodied in s 20 of the Act.

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The IC erred when it held that fighting per se warranted an automatic dismissal

Mr Kuthiah has also submitted that evidence of fighting per se by an employee is insufficient to warrant an automatic dismissal. According to him, the employer by failing to go further to show that it was the employee who had started the fight has, consequently, failed to show that the applicant's dismissal is with just cause or excuse. According to Mr Kuthiah the fight was occasioned by the extreme provocation of Julie.

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The IC erred when it made the wrong inferences of fact

Mr Kuthiah has further submitted that the IC erred when it made the following wrong inferences of fact —

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- (a) that the applicant followed Julie to the car park with the intention of fighting when there was no evidence to support such an inference and when there was evidence that it was lunch time and the employees could leave the employer's premises via the car park;
- (b) that the applicant was previously involved in a fight when this was not pleaded and there was no such evidence before the court; and
- (c) that the applicant was not a truthful witness when none of the witnesses who were called at the domestic inquiry was able to testify as to who had started the fight.

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- A** *The IC erred when it did not consider that the applicant had no opportunity to cross-examine the respondent's witness*

According to Mr Kuthiah, there was a breach of the rules of natural justice when the applicant was not given an opportunity to cross-examine the employer's witness during the hearing before the IC.

- B** *The IC erred when it asked itself the wrong question*

According to Mr Kuthiah, the IC acted without jurisdiction when it found that the applicant was justly dismissed for starting the fight when the employer did not rely on that reason to dismiss the applicant.

- C** THE EMPLOYER'S CASE

Mr Yee Sue Kai, the learned counsel for the employer, has contended that the application should be dismissed on the following grounds:

- D** (1) the employer has successfully proven the misconduct of the applicant, to wit, fighting in the workplace and since in the employee's hand book agreement, it is clearly stated that fighting per se warrants an instant dismissal the applicant was dismissed with just cause or excuse;
- E** (2) the IC acted correctly when it relied on the statements adduced before the board which conducted the domestic inquiry;
- (3) fighting per se in the workplace is a serious misconduct because the employer employs 420 workers and, consequently, the IC did not err because it had considered the rules and regulations of the employer;
- F** (4) the findings of the IC on the credibility of the witnesses including that of the applicant should not be disturbed as the IC had heard three of the employer's witnesses; and
- (5) the record of appeal is incomplete because it did not contain the notes of evidence of the IC.

- G** THE FINDINGS OF THE COURT

It is trite law that the act, in particular, s 20 of the Act was enacted to mitigate the harshness of the common law relating to the dismissal of an employee by his employer. This is clearly borne out in the judgment of the Court of Appeal in the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & another appeal* [1996] 1 MLJ 481. In a subsequent case, *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137 at p 160, Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal expressly referred to that case and said as follows:

- I** This court has in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & another appeal* [1996] 1 MLJ 481 held that the very purpose for which Parliament passed the Act and the several amendments thereto was to mitigate the rigours of the common law and the doctrines of equity in their application to the relationship between an employer and his workman.

In *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, Edgar Joseph Jr FCJ at p 22 D–G held that the right to livelihood is one of the fundamental rights under Part II of the Federal Constitution.

In the instant proceedings although the IC was correct in holding that in proceedings by an employee pursuant to s 20 of the Act to challenge his purported dismissal by his employer the onus is on the employer to show that it is with just cause or excuse the IC committed an error of law when it asked itself the wrong question.

In cases where the employee has been dismissed for misconduct and the misconduct complained of is fighting it is incumbent on the IC to consider and satisfy itself whether based on the facts fighting per se warrants an automatic dismissal. It is not disputed that in the instant case, the rules and regulations of the employer did not provide for instant dismissal for the offence of fighting per se. They provide as follows:

All employees of this company are required to observe the following regulations of the company. A breach of any factory rules and conditions of employment will make you liable to disciplinary action including suspending without pay and termination of employment with or without notice.

Category I

(First to third warning followed by suspension for up to two weeks)

- (1) ...
- (2) ...
- (3) ...
- (4) ...
- (5) ...
- (6) ...
- (7) ...
- (8) ...
- (9) ...
- (10) ...
- (11) ...
- (12) ...

Category II

(Suspending for up to two weeks, pending an enquiry, dismissal)

- (1) ...
- (2) ...
- (3) ...
- (4) ...
- (5) ...
- (6) ...
- (7) ...

- A** (8) ...
(9) ...
(10) ...
(11) ...
(12) ...
- B** (13) ...
(14) ...
(15) ...
- Category III
- C** (1) Stealing.
(2) Deliberately damaging the company's property.
(3) *Fighting or striking another employee within the company's premises.*
(4) Distributions of unauthorized subversive notices, pamphlets etc.
(5) Embezzlement of the company's funds.
- D** (6) Distribution and consumption of illegal drugs within the company's premises.'
(Emphasis added.)

It is pertinent to note that the words in brackets '(suspending for up to two weeks, pending an inquiry, dismissal) which appear under 'Category II' do not appear under 'Category III'. That being the case the qualifying words would be 'A breach of any factory rules and conditions of employment will make you liable to disciplinary action including suspending without pay and termination of employment with or without notice 'which appear above the words 'Category I'.

- F** According to my understanding of the above qualification, what it means is that the act of 'fighting or striking another employee within the company's premises' per se does not warrant instant dismissal since the words used are 'liable to' which mean 'subject to' and it is for the employer to decide what is a reasonable form of disciplinary action to impose on the employee after taking into consideration all the surrounding circumstances and the employee's length of service.
- G**

On the facts of the instant case, there was clear evidence which was adduced at the domestic inquiry by several eye witnesses that the applicant and Julie had quarrelled and pulled one another's hair at the car park of the employer's premises. However, the applicant had testified before the domestic inquiry that it was Julie who had started the quarrel by using harsh and vulgar words on her. She denied that she had hit Julie. Instead she said that it was Julie who hit her. She also pleaded not to be dismissed and to be given another chance. She further promised not to quarrel at the workplace again.

- H**
- I** The applicant's witnesses, namely, Lackmi, Theresa and Jeeva, testified that they heard Julie using vulgar words on the applicant and they also saw Julie holding her shoe and threatening to hit the applicant with it. However, they were unable to say who was the one who started the quarrel. None of

the witnesses saw the applicant and Julie hitting one another. There was another witness, Rajeswary, who said that it was Julie who started the quarrel and she saw Julie pulling the applicant's hair upon reaching the car park.

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Witnesses, Jeeva and Kamaleswary also saw Julie pulling the applicant's hair which was followed by the applicant pulling Julie's hair.

B

In a separate inquiry, Julie had testified that it was the applicant who had called her a prostitute and that the applicant also used other harsh words on her. From Julie's evidence, it would appear that it was the applicant who had started the fight by pulling her hair first and then pushing her against the car and slapping her.

Julie called four witnesses, namely Parimala, Rajeswary, Kogila and Nagaswary. Parimala's evidence substantially supported Julie's evidence. Rajeswary's evidence showed that she only saw the two of them pulling each other's hair and also Julie holding her shoe and pointing it in the direction of the applicant after the applicant had threatened verbally to hit Julie with her shoe.

C

Kogila and Nagaswary did not say who started the quarrel. However, they saw both Julie and the applicant pulling each other's hair and clothes and the applicant pressing her body on Julie's.

D

At the conclusion of the two domestic inquiries due to the inability of the panel to determine whether it was the applicant or Julie who had started the fighting, the panel unanimously recommended that both the applicant and Julie be found guilty of quarrelling and fighting on the employer's premises and that both of them be dismissed on the grounds that they had committed a serious offence under the employer's rules and regulation which warranted an automatic dismissal.

E

Pursuant to the recommendations of the panel the general manager, Mr Pai Wen Min, sent to the applicant a letter dated 5 July 1999 ('the letter of dismissal') informing the applicant that she was dismissed with effect on 6 July 1999 based on the decision of the panel officers. She was also paid her salary for the month of June, five days wages for July and unpaid leave for eight days.

F

On the following day, the applicant sent a letter of appeal to Mr Pai pleading not to be dismissed and to be reinstated on the grounds, inter alia, of financial hardship and her long record of service with the company, ie 11 years.

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On 9 July 1999, Mr Pai replied that the management had conducted a second inquiry and because the offence which she had committed was a serious one since the company has a task force of 420 workers the management could not give her an exemption from the company's rules and regulations.

H

The IC erred when it did not consider that the applicant was never given the opportunity to cross-examine Julie nor Julie's witnesses during the domestic inquiry. Since this was not done it amounted to a breach of the rules of natural justice. The IC should have rectified the breach of the rules

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A of natural justice by allowing the applicant to cross-examine Julie and Julie's witnesses during the hearing before the IC. The reason is because on questions affecting the credibility of witnesses, the findings of the IC are final and this court cannot interfere unless the findings have no basis and the decision is so unreasonable that no reasonable tribunal could have arrived at it.

B The IC also erred when it held that it is highly probable that the applicant had been orally warned before by Mr Chan, her previous supervisor when Mr Chan was never called as a witness before the domestic inquiry and the IC.

C Further, the panel which conducted the domestic inquiry did not consider whether a lesser punishment would have been sufficient bearing in mind that the applicant was the longest serving employee with 11 years of service, that the fighting took place in the car park and not in the area of the workplace where work is actually been done and that the panel could not determine who had started the quarrel and the subsequent fight. In my judgment, on this ground alone, the decision of the IC ought to be quashed.

D Mr Yee Sen Kai has placed much reliance on the case of *Pernas OUE Penang Sdn Bhd v Jusbinder Suraj Singh* (1997) 1 ILR 115 where the security officer of a hotel had been dismissed for fighting on the hotel premises.

E In that case, based on the domestic inquiry notes, the IC found that the claimant was not given an opportunity to cross-examine one Zahir Hussain who was the material witness in the case. According to the claimant, Zahir Hussain had punched him on the face. The claimant's attempts to ward off the blows and restrain Zahir Hussain failed. The claimant suffered injuries to his face.

F The IC had disregarded the domestic inquiry and instead proceeded on the merits of the case to determine whether the dismissal of the claimant by the company was justified.

G The issue before the IC was whether the claimant was guilty of fighting which was tantamount to misconduct and if so, whether the misconduct warranted dismissal. The claimant admitted that he and Zahir Hussain were fighting on the relevant date. In my judgment that case is clearly distinguishable from the instant case because although the IC in that case was of the view that fighting on the company's premises is a serious act of misconduct because when a worker is assaulted in the work place it undermines discipline it did not rule fighting alone to warrant automatic dismissal. It went further and satisfied itself from the evidence of the witnesses adduced before it that it was the claimant who had pushed Zahir Hussain first and that it was that act which amounted to an assault.

H Relying on the case of *Steel Farm Industries Malaysia Sdn Bhd v Foo Fook Ban* (1991) 1 ILR 412, the IC in *Pernas OUE Penang Sdn Bhd*, found that since it was the claimant who had provoked and actively induced Zahir Hussain into fighting him, the dismissal of the claimant was justified.

I The IC also made reference to another case, *Mui Beach Hotel v National Union of Hotel, Bar & Restaurant Workers* [1982] 2 ILR 2 where the IC in

holding that the act of hair pulling by the two claimants in that case constituted fighting had said that fighting warranted an instant dismissal. However, in my judgment, that case is also clearly distinguishable because the wording in the Employees Handbook Agreement pertaining to fighting is substantially different from that in the instant case. For purposes of comparison, I reproduce below the relevant portion:

Fighting

The management will not tolerate violence of any nature on its premises. *Any staff found fighting while on duty or off duty in the Hotel premises will be instantly dismissed.* (Emphasis added.)

In *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137, at p 158, Gopal Sri Ram JCA said as follows:

... while the ordinary principles of common law relating to the discharge of a contract of service by repudiation and acceptance may continue to apply under the United Kingdom statute, they are wholly irrelevant to a case under s 20(1) of the Act. Industrial adjudication is not concerned with the technicalities that form part and parcel of the common law doctrine of repudiation. Indeed, s 30(5) of the Act expressly declares that the Industrial Court:

‘... shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.’

Accordingly, in our judgment, the Industrial Court — when it comes to decide whether a workman was dismissed without just cause or excuse — is wholly unconcerned with whether there was a repudiation by the workman of his contract of employment which was accepted by the employer, but rather with the much broader question whether what happened to the workman was just and equitable. If, at the end of the day, it finds that the conduct of the workman in all the circumstances of the case was such that he deserved what he got, then, *cadit quaestio*. But, if it finds that the act or omission on the part of the employer that deprived the workman of his proprietary right to earn a living to have been without just cause or excuse, then it will, and must, interfere. It must set matters right by making an award in favour of the workman. It may reinstate him. Or, if reinstatement is not the appropriate relief, it will usually award him reasonable compensation according to the circumstances of the particular case.

In view of the above statement of law, it is clear that in the instant case, the IC erred when it applied common law principles in arriving at its decision that the dismissal of the applicant was with just cause or excuse instead of the statutory principles contained in s 20 of the Act when it decided that the applicant’s dismissal was with just cause or excuse primarily on the ground that the applicant had committed a serious act of misconduct, to wit, fighting in the workplace.

It is incumbent on the IC to determine based on the evidence before it whether the misconduct which was complained of by the employer as the ground of dismissal, to wit, ‘fighting and striking another employee on the company’s premises’ was in fact committed by the applicant and if so whether such ground constitutes just cause or excuse for the dismissal (see

- A *Wong Yuen Hock v Syarikat Hong Leong Sdn Bhd and another appeal* [1995] 2 MLJ 753 at p 762; *Asiatic Development Bhd v Kanesan all Manayah & Anor* [1998] MLJU 198).

B Based on the available evidence, the IC found that the applicant had committed the misconduct. However, in deciding that the applicant's dismissal was with just cause or excuse, the IC made an error of law because it decided solely on the evidence of the applicant and the notes of the domestic inquiry that it was the applicant who had followed Julie to the car park with the intention of fighting without giving the applicant an opportunity to cross-examine Julie and her witness, Parimala, before the IC so that the IC could decide on the creditability of the applicant vis-a-vis that of Julie and Parimala after having the benefit of seeing them giving evidence before it. The IC also erred when it held that it was the duty of the applicant to call as her witness, Maliga, her line leader. It is a principle of industrial law that it is for the employer to prove that it was the applicant who had provoked Julie and actively induced the subsequent fight. It is not for the applicant to prove that she did not cause the fight. If there is any doubt which arises from the conflicting evidence, the benefit of the doubt should be given to the applicant.

E The IC had erroneously made a finding of fact that the applicant had followed Julie to the car park with the intention of fighting when neither Julie nor her witnesses who were called at the domestic inquiry testified before the IC. In view of the statements of the witnesses called before the two domestic inquiries which did not show conclusively that it was the applicant who had started the fight by provoking the quarrel and initiating the assault on Julie, the benefit of the doubt should have been given to the applicant.

F In my judgment, the decision of the IC is perverse in the light of the evidence before it and ought to be quashed.

G However, in view of the large number of workers employed by the employer, to wit, 420, and the serious injuries which were suffered by both the applicant and Julie which caused both of them to faint and the applicant to be hospitalized for two days, the court felt that the reinstatement of the applicant was not appropriate despite her long service of 11 years. In the premises, the court ordered that the matter be remitted back to the IC to consider the amount of compensation in lieu of reinstatement to be paid to the applicant.

H The court is aware of the principle of law that in certiorari proceedings, the court cannot cloak the exercise of appellate power by reviewing findings of fact based on the credibility of witnesses. However, that principle of law is subject to important exceptions. The following passage from the judgment of Edgar Joseph Jr FCJ in *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p 224, was applied in *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1998] 2 MLJ 372:

I ... it is not open to this court to find that the Employee has been dismissed from service without just cause or excuse, as this was a question of fact for the Industrial Court by virtue of the Industrial Relations Act 1967.

This point appears to be supported by what Lord Brightman said in *R v Hillingdon LBC; ex p Puhlhofer* [1986] AC 484 at p 518:

Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision making power...

However, like most principles, there are important exceptions, which tend to blur the conceptual distinction between errors of law and fact. Two of these exceptions which are relevant to the present case must be mentioned, they are as follows.

Reliance upon an erroneous factual conclusion may itself offend against the principles of illegality or irrationality enunciated by Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374. Indeed, in *R v Hillingdon LBC; ex p Puhlhofer*, Lord Brightman made this clear by adding to the passage in his judgment cited above, 'save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely'.

Where there is no evidence to support a conclusion, there is necessarily an error of law in the decision arrived at (see *Edwards v Bairstow* [1956] AC 14; *Din (Taj) v Wandsworth LBC* [1983] 1 AC 657 at p 664H, per Lord Wilberforce; *R v Hillingdon LBC; ex p Islam (Tafazzul)* [1983] 1 AC 688 at p 708D, per Lord Wilberforce and at p 717G, per Lord Lowry).

But, as *Wade and Forsyth's Administrative Law* (7th Ed, 1994) has correctly pointed out (at p 312):

'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably (capable of supporting the finding (see *Allinson v General Council of Medical Education and Registration* [1984] 1 QB 70 at pp 760, 763; *Lee v The Showmen's Guild of Great Britain* [1952] QB 329 at p 545), or where, in other words, no tribunal could reasonably reach that conclusion on that evidence (see *R v Roberts* [1908] 1 KB 407 at p 423). This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorized and ultra vires.

As I have said, our conclusion that the employee had been dismissed from service without just cause or excuse was arrived at as a result of reviewing the award not only for process but also for substance and, in my view, came within the range of the two exceptions aforesaid.

In my judgment, the two exceptions as set out in the above case are also applicable in the instant case.

Order accordingly.